In The

Supreme Court of the United States

October Term 1977

No. 77-1510

SURETY TITLE INSURANCE AGENCY, INC.,
Petitioner,

v.

VIRGINIA STATE BAR,
Respondent.

REPLY TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Statutes

Other Authorities

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I. OPINIONS BELOW

The opinion of the district court is reported in 431 F.Supp. 298 (E.D. Va. 1977). The opinion of the Court of Appeals is reported in 571 F.2d 205 (4th Cir. 1978). No opinion was issued in connection with the order of the Court of Appeals denying Petitioner's motion for rehearing, or in the alternative rehearing *en banc*; the order is reproduced in the Appendix to the Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit ("App") 32a.

II. QUESTION PRESENTED

In a case under Sections 1 and 2 of the Sherman Act, 15 U.S.C. §§ 1 & 2 (1970), challenging the method mandated

by the State for the issuance of opinions by a state agency, may a federal court properly abstain when it finds that a state court proceeding may aid it in resolving the state action exemption question?

III. STATEMENT OF THE CASE

The Supreme Court of Virginia is charged by the General Assembly with the responsibility to "prescribe, adopt, promulgate and amend rules and regulations: (a) defining the practice of law."[1] Pursuant to this statute and its inherent power to regulate the practice of law, the Supreme Court of Virginia in 1938 defined the practice of law. The definition was drafted by a special subcommittee of lawyers appointed by the Supreme Court. The Supreme Court ordered release of the proposed definitions and solicited public comments which brought about one addition to the proposed definition. The definition, adopted in 1938, remains unchanged today.[2]

The Supreme Court was further authorized by the General Assembly to create the Virginia State Bar ("State

[1] VA. CODE § 54-48(a) (1974 Repl. vol.)

[2] The Supreme Court of Virginia promulgated the following definition of the practice of law:

> Generally, the relation of attorney and client exists, and one is deemed to be practicing law, whenever he furnishes to another advice or service under circumstances which imply his possession and use of legal knowledge or skill.
>
> Specifically, the relation of attorney and client exists, and one is deemed to be practicing law, whenever—
>
> (1) One undertakes for compensation, direct or indirect, to advise another, not his regular employer, in any matter involving the application of legal principles to facts or purposes or desires.
>
> (2) One, other than as a regular employee acting for his employer, undertakes, with or without compensation, to prepare for another legal instruments of any character, other than notices or contracts incident to the regular course of conducting a licensed business. Rules of the Supreme Court of Virginia, Part Six, Rule 6:I, 216 Va. 1062 (1976).

Bar") "to act as an administrative agency of the Court."[3] The State Bar was created pursuant to this authority by the Rules of the Supreme Court of Virginia in 1938. Each attorney practicing law in Virginia is required by statute and the Rules of the Supreme Court to be a member of the State Bar.[4]

When the Supreme Court of Virginia established the State Bar, it also promulgated rules regarding the Bar's organization and government. The Supreme Court created the Virginia State Bar as a self-regulatory agency with two primary functions: first, to enforce disciplinary rules issued by the Supreme Court; second, to issue advisory opinions on ethics and the unauthorized practice of law for the purpose of providing guidance to attorney-members.[5] While an action may be taken against a lawyer for violating a disciplinary rule of the Court,[6] unauthorized practice of law

[3] VA. CODE § 54-49 (1974 Repl. Vol.) provides in pertinent part:

> The Supreme Court may, from time to time, prescribe, adopt, promulgate and amend rules and regulations organizing and governing the association known as the Virginia State Bar, composed of the attorneys-at-law of this State to act as administrative agency of the Court. . . .

The Virginia State Bar is an integrated bar similar to the State Bar of Arizona. *See Bates v. State Bar of Arizona,* 433 U.S. 350, 353 n. 3 (1977).

[4] VA. CODE § 54-49 (1974 Repl. Vol.); Rules of the Supreme Court of Virginia, Part Six, Rule 6:1V ¶ 2, 216 Va. 1141 (1976).

[5] Rules of the Supreme Court of Virginia, Rule 6:IV ¶ 9, 10, 216 Va. 1146-47 (1976) & Rule 6:V art. IX, 216 Va. 1173 (1976).

[6] Rules of the Supreme Court of Virginia, Part Six, IV, ¶ 13, 216 Va. 1149 (1976). Petitioner's statement that "the Bar, through DR 3-101, has directed its members to withhold their services in any transaction in which a lay person is violating any of their UPLS . . .", Petition for Writ of Certiorari, 3-4, is incorrect since it is the Supreme Court that directs attorneys to withhold services which violate a disciplinary rule. The Supreme Court, thus, is the real party in interest here. *Cf. Bates v. State Bar of Arizona,* 433 U.S. 350 (1977) (Supreme Court of Arizona held to be real party in interest in an antitrust action challenging enforcement of a disciplinary rule against advertising by attorneys.)

opinions are purely advisory and apply the Supreme Court's definition of the practice of law. Advisory opinions are not enforced by the State Bar. Rather, an action may be brought by the Attorney General or a Commonwealth's Attorney in the State courts to enjoin the unauthorized practice of law,[7] which is subject to judicial review by the Supreme Court. A non-lawyer has an appropriate forum in which to litigate issues involving the unauthorized practice of law either by responding to an enforcement action by the Commonwealth, or by seeking a declaratory judgment in state court.[8] In either instance the State court has an opportunity to examine the fairness of the enforcement process and the substance of acts alleged to be the unauthorized practice of law.

There are three opinions issued by the Bar which are relevant to this case. First, on August 5, 1942, the Bar issued Opinion 17, which considered whether the State Bar would recommend to the Supreme Court that the definition of the practice of law be modified to permit title insurance companies to certify real estate titles. The Opinion concluded that the Bar would not petition the Supreme Court to change its definition.[9]

The State Bar again considered unauthorized practice of law problems associated with title insurance companies in 1973, which resulted in the Bar's issuance of Opinions 43 and 44.[10] Prior to the issuance of these opinions the Bar circulated the proposed opinions throughout the Common-

[7] VA. CODE §§ 2.1-121, 2.1-124 (1973 Repl. Vol.) & 54-44 (1974 Repl. vol.).

[8] VA. CODE § 8.01-184 (1977 Repl. Vol.); at the time the Attorney General brought the enforcement action in Virginia Beach the precursor to § 8.01-184, VA. CODE § 8-578 (1957 Repl. vol.) similarly authorized declaratory relief.

[9] *Virginia State Bar Professional Handbook,* Opinions on the Unauthorized Practice of Law Committee of the Virginia State Bar, Opinion 17 at 49 (hereinafter *"Professional Handbook—UPL"*).

[10] *Professional Handbook*—UPL, Opinions 43 and 44 at 108-124.

wealth; included the theme in the *Virginia Bar News*;[11] held lengthy hearings on them on two separate occasions; and, considered briefs submitted by interested parties, including several title insurance companies. Opinion 43 was issued by the Bar on June 20, 1974, and stated that a title company could not issue a title policy to a non-lawyer based upon the title examination done by lay employees of the company, because a title policy could mislead buyers into believing it was a title opinion of an attorney.[12] As the district court found, this opinion was based on the consideration that "the proposed practice, falling within the Virginia Supreme Court's general definition of the practice of law coupled with the absence of an attorney-client relationship and accompanying ethical protections was deemed to present an unacceptable risk to the unwary consumer."[13] At the same time, the Bar approved Opinion 44, which stated that a title company could issue a title policy to a non-lawyer upon the request of an attorney representing the non-lawyer.[14]

The case was presented to the district court on cross-motions for summary judgment supported by affidavits and a stipulation of the facts. Petitioner, Surety Title Insurance Agency, Inc. ("Surety") presented three arguments to the district court. First, Surety asserted that the State Bar's issuance of advisory opinions constituted a boycott of its business and, thus, was a *per se* violation of §§ 1 and 2 of the Sherman Act, 15 U.S.C. §§ 1 & 2 (1973). Second, Surety asserted that the state action defense was not available to the State Bar since there was no State command. Third, Surety asserted that the Eleventh Amendment did not preclude the

[11] 22 VA. B. NEWS 21 (No. 2, 1973), 24 (No. 3, 1973), 35-36 (No. 5 1974); 23 VA. B. NEWS 37 (No. 1, 1974).

[12] *Professional Handbook—UPL,* Opinion 43 at 108.

[13] *Surety Title Insurance Agency, Inc. v. Virginia State Bar,* 431 F.Supp. 298, 302 (E.D. Va. 1977); App. 14a.

[14] *Professional Handbook—UPL,* Opinion 44 at 116.

award of damages against the State Bar. Surety did not challenge the definition of the practice of law as enunciated by the Supreme Court of Virginia or the correctness of any particular ethical or unauthorized practice of law opinion.[15]

The State Bar set forth four reasons why the district court should not grant summary judgment in favor of Surety. First, the court was urged to decline, on the basis of abstention or comity, to take jurisdiction over the case since the challenged opinions implemented the Supreme Court's definition of the practice of law and raised issues which could more properly be answered in a pending State court proceeding. Second, regulation of the unauthorized practice of law by the Supreme Court of Virginia and the State Bar was mandated by the State acting as a sovereign, and thus exempt from the Sherman Act. Third, should the court find that the State Bar's activities were not exempt from the antitrust laws, the State Bar had, nonetheless, not violated substantive rules of the antitrust laws since no proof had been offered of the opinions' anticompetitive effects. Fourth, even assuming a violation of the antitrust laws, the award of damages against the State Bar was barred by the Eleventh Amendment of the United States Constitution and even if not barred, should be awarded only prospectively.

The district court held that the issuance of unauthorized practice of law and ethical opinions by the State Bar was compelled by the Commonwealth of Virginia.[16] The Court

[15] 431 F.Supp. at 300; App. 8a.

[16] The District Court declared:

> The Court is of the view that the issuance of Unauthorized Practice of Law and Ethical opinions by the defendant is compelled by the Commonwealth of Virginia. Acting pursuant to statutory and inherent authority, the Supreme Court of Virginia has created the State Bar and promulgated the rules and by-laws from which the Ethical and Unauthorized Practice of Law opinion processes have emerged. The State Bar, acting through its Council or the appropriate Committees, is required to render, at the request of a member, advisory opinions on contemplated professional conduct. These directives are not couched in the permissive "may," but rather are expressed in the mandatory phrase "shall render such opinion." 431 F.Supp. at 307, App. 24a.-25a. (Citation omitted.)

reasoned that unlike the light bulb distribution system in *Cantor v. Detroit Edison Co.*, 428 U.S. 579 (1976), or the minimum fee schedule in *Goldfarb v. Virginia State Bar*, 421 U.S. 773 (1975), the issuance of opinions on the unauthorized practice of law was a product of the State's command. The district court, nonetheless, held that the issuance of opinions violated the antitrust laws under the rationale developed by Mr. Justice Blackman in *Cantor v. Detroit Edison, supra.* The district court stated that since the method by which unauthorized practice of law opinions were promulgated was through a State agency, a balancing of interests was necessary, with the detriments of the system outweighing its benefits. The court did not find that any particular unauthorized practice of law opinion restrained trade since it rested its decision solely on the method by which opinions were issued.[17] The Court's decision in *Bates v. State Bar of Arizona*, 433 U.S. 350 (1977), had not been handed down at the time of the district court's decision.

On appeal to the Fourth Circuit, the Court of Appeals vacated and remanded the case to the district court with instructions to "withhold further action until the final decision of the Supreme Court of Virginia in a case filed by the Attorney General of Virginia against the plaintiff herein. . . ." App. 6a. The Court of Appeals, after examining the Court's recent opinions in *Bates v. State Bar of Arizona*, 433 U.S. 350 (1977), and *Cantor v. Detroit Edison Co.*, 428 U.S. 579 (1976), determined that the factual record required that it withhold ruling on the applicability of the Sherman Act, 15 U.S.C. § 1 (1973), to the State Bar "until

[17] 431 F.Supp. at 300, App. 8a.

the Virginia courts have had an opportunity to decide the disputed questions of state law." App. 6a.[18] In particular, the Court noted *inter alia* that the State court proceeding involved a challenge to the substance and enforcement of the State's proscriptions against the unauthorized practice of law as it relates to title insurance. *Id.* Implicit in the Court's opinion was a recognition that a State court ruling in an enforcement action on facts similar to those giving rise to the Bar's opinions would aid the Court in determining whether the opinions were correct applications of the Supreme Court's definition of the practice of law.

IV. REASONS FOR DENYING THE WRIT

A.

The Case Law On State Action Has Been Examined By The Court In Several Recent Decisions And Does Not Merit Review In This Case.

This case presents no issue for resolution by the Court since it has considered the applicability of the Sherman Act, 15 U.S.C. §§ 1 & 2 (1973), to "state action" in several recent cases. *City of Lafayette v. Louisiana Power & Light Co.*, 46 U.S.L.W. 4265 (Mar. 29, 1978); *Bates v. State Bar of Arizona*, 433 U.S. 250 (1977); *Cantor v. Detroit Edison Co.*, 428 U.S. 579 (1976); *Goldfarb v. Virginia State Bar*, 421 U.S. 773 (1975). In each case the Court has been called upon to refine and apply the doctrine enunciated in *Parker v. Brown*, 317 U.S. 341 (1943), that it was not the purpose of the Sherman Act "to restrain a state or its officers or agents from activities directed by its legislature." 317 U.S. at 350-51.[19]

The net effect of the Court's recent cases is to hold that the Sherman Act is inapplicable to anticompetitive activities of a state agency which are taken "pursuant to a state policy to displace competition with regulation." *City of Lafayette v. Louisiana Power & Light Co.*, 46 U.S.L.W. at 4271. Although the decisions in *Cantor* and *City of Lafayette* have been rendered by a plurality of the Court, a majority, at a minimum, have indicated that the state action exemption is viable when a state conscientiously elects to exempt a particular area of economic activity from competition of the marketplace, establishes a regulatory body

[18] Petitioners complaint, Petition for Writ of Certiorari, 5, that new arguments were raised in the State Bar's Reply Brief was presented to the Court of Appeals by petitioner's "Motion of Appellee to Strike Portions of Reply Brief of Appellants or In The Alternative To File A Reply Brief" is irrelevant to the writ since the Court of Appeals permitted the petitioner to file a reply brief. Moreover the State Bar's Reply Brief, by discussing the reasons for the Court of Appeals to defer ruling on the issues before it pending resolution of the state case, raised no new issues since the State Bar has asserted throughout this litigation, that it would be improper to enjoin the opinion process without the development of evidence on the scope of the challenged opinions. Even if petitioner's assertions are correct, however, he has suffered no harm since the Court of Appeals allowed him to file a reply on this issue.

[19] The Court of Appeals could have correctly held that the Sherman Act was inapplicable to the State Bar case since the State had:

a. Established a unified Bar with the authority to insure the proper conduct of attorneys.

b. Established rules for the organization and governance of the Bar, including a command to the Bar to issue advisory opinions. 431 F.Supp. at 307, App. 24a-25a.

c. Established through the Supreme Court of Virginia a method for defining the unauthorized practice of law.

d. Established, through the Supreme Court, a definition of the practice of law to act as a standard for the Bar's issuance of advisory opinions.

e. Established that the enforcement of the unauthorized practice of law is not vested in the Bar but in the Attorney General and Commonwealth's Attorneys and that non-lawyers may seek review through actions in the state courts for declaratory relief.

f. Established enforcement procedures against attorneys who aid in the unauthorized practice of law before the state's courts or before a specially designed disciplinary board, at the lawyer's option, with ultimate review by the Supreme Court of Virginia.

to oversee the regulated area, mandates the composition of that regulatory agency and commands its course of action. *See Bates v. State Bar of Arizona,* 433 U.S. 350 (1977). *See also City of Lafayette v. Louisiana Light & Power Co.,* 46 U.S.L.W. 4265 (March 29, 1978) (Opinion of Mr. Justice Blackman, joined by Justices Stevens, Marshall and Powell, 46 U.S.L.W. at 4270-72; dissent of Mr. Justice Stewart joined Justices White, Blackman and Rehnquist, 46 U.S.L.W. at 4275-77). Consistent with this line of cases, Virginia has chosen to pervasively regulate the practice of law within its border.

B.

Factual Issues Exist Which Make It Inappropriate For The Court To Grant The Writ.

The Court has emphasized that a detailed inquiry should be made by the lower courts to determine whether activities of a state agent are in fact directed by the State.[20] In *City of Lafayette v. Louisiana Light & Power Co.,* 46 U.S.L.W. 4265, 4266, the Court cited with approval the Fifth Circuit's holding [532 F.2d. 431, 435 (5th Cir. 1976)] that:

> Whether a governmental body's actions are comprehended within the powers granted to it by the legislature is, of course, a determination which can only be made under the specific facts in each case. A district judge's inquiry on this point should be broad enough to include all evidence which might show the scope of legislative intent. 46 U.S.L.W. at 4266.

[20] The grants of writs of certiorari and remands for further consideration in light of *City of Lafayette v. Louisiana Power & Light Co.,* 46 U.S.L.W. 4265 (Mar. 29, 1978), by the Court in three recent cases indicate that further proceedings below to develop an appropriate factual record is required. *City of Impact v. Whitworth,* 559 F.2d 378 (5th Cir. 1977) *cert. granted & vacated,* 46 U.S.L.W. 3664 (Apr. 25, 1978) (No. 77-734); *Fairfax Hospital Ass'n. v. City of Fairfax,* 562 F.2d 280 (4th Cir. 1977) *cert. granted & vacated* 46 U.S.L.W. 3664 (Apr. 25, 1978) (No. 77-826); *Pleasure Driveways & Park Dist. of Peoria v. Kurek,* 557 F.2d 580 (7th Cir. 1977) *cert. granted & vacated* 46 U.S.L.W. 3664 (Apr. 25, 1978) (No. 77-734). *See also, Arizona State Dental Ass'n. v. Boddicker,* 549 F.2d 626 (9th Cir.) *cert. denied* 98 S.Ct. 73 (1977).

Consistent with the Fifth Circuit, the Court of Appeals in this case held that determination of the state action issue should await further development of facts which would aid the district court in determining whether the Sherman Act applied to the State Bar. The Court of Appeals found it significant that the Court in *Bates* held "that the state policy is so clearly and affirmatively expressed and that the State's supervision is so active." App. 5a. While the State court proceedings may not address the relationship of the Bar to the Supreme Court—particularly since the district court found a command directing the State Bar to issue the opinions—the State court will be called upon to use its expertise in local law and customs to determine the substance of the unauthorized practice of law.[21] The State court proceedings, thus, will provide the Supreme Court of Virginia with an opportunity to review the application of its definition of the practice of law to activities of a title insurance company. Through such review, the State courts will have an opportunity to determine whether the Bar's opinions were the correct appli-

[21] *See e.g., Railroad Comm'n of Texas v. Pullman Co.,* 312 U.S. 496, 499-502 (1946). In *Railroad Comm'n* Mr. Justice Frankfurter, for the Court, directed the district court to abstain "pending a determination of proceedings to be brought within reasonable promptness, in the state court . . ." 312 U.S. at 501-02 (Emphasis added); thus "avoiding needless friction with state policies." 312 U.S. at 500. The Texas statute required the State Railroad Commission to adopt *inter alia* regulations "to prevent any and all abuses in the conduct of their business." 312 U.S. at 498 n.1. Similarly, the State Bar is commanded by the Supreme Court to render opinions which serve to prevent abuses involving the unauthorized practice of law.

cation of the Supreme Court's definition.[22] Accordingly, the Court of Appeals' decision to defer a determination of the state action issue was proper.

Additionally, the Court should not exercise its discretion to grant certiorari since the unusual factual posture of this case is unlikely to occur in the future. Petitioner does not challenge the correctness of any given decision of the State Bar, as in *Goldfarb,* but rather broadly attacks the method by which opinions are rendered. There are no facts in the record on whether these opinions have any anticompetitive effects. The Court, thus, has no way of determining, absent the state action exemption, whether a case or controversy exists of the type the antitrust laws were intended to prevent and which flows from respondent's alleged acts. 15 U.S.C. §§ 15 and 26 (1973); *See Brunswick v. Pueblo Bowl-O-Mat, Inc.,* 97 S.Ct. 2061 (1977).

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[22] Contrary to Petitioner's assertions, this case is unlike *Vendo Co. v. Lektro-Vend Corp.,* 433 U.S. 623 (1977). Petition for Writ of Certiorari 8, 10. In *Vendo* the Court held that § 16 of the Clayton Act was not an exception to the Anti-Injunction Act, 28 U.S.C. § 2283 (1978). In this case, however, there is no attempt to enjoin a state proceeding; rather, the Court of Appeals is deferring to a state court which may aid it in its inquiry of "evidence which might show the scope of legislative intent." *City of Lafayette v. Louisiana Light § Power Co.,* 46 U.S.L.W. at 4266. Accordingly, petitioner's arguments that the state case does not involve "a state law question involved in this antitrust case" is misplaced. Petition for Writ of Certiorari 9-10.

V. CONCLUSION

For the reasons set forth, the Petition for a Writ of Certiorari should be denied.

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